IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 80 and 81

PAN AMERICAN PETROLEUM CORPORATION AND TEXACO, INC.,
Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, AND THE HONORABLE ANDREW D. CHRISTIE, SITTING AS A JUDGE OF THAT COURT, AND CITIES SERVICE GAS COMPANY,
Respondents.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF COLORADO INTERSTATE GAS COMPANY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 80 and 81

Pan American Petroleum Corporation and Texaco, Inc.

Petitioners,

v.

The Superior Court of the State of Delaware in and for New Castle County, and The Honorable Andrew D. Christie, sitting as a Judge of that Court, and Cities Service Gas Company

Respondents.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF COLORADO INTERSTATE GAS COMPANY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Colorado Interstate Gas Company respectfully moves for leave to file the accompanying brief *amicus curiae* in support of respondents. The consents of the respondents, The Superior Court of the State of Delaware in and for New Castle County, The Honorable Andrew D. Christie sitting as a Judge of that Court, and Cities Service Gas Company

have been obtained. Consents of the petitioners have been refused. Notwithstanding this lack of consents, movant submits that it represents interests of its own and of others which bespeak its participation herein.

Movant is a natural gas pipeline company which purchases large quantities of gas in the Hugoton Field of Kansas. This gas, along with gas produced in other midcontinent areas, movant transports and sells in interstate commerce. Purchaser-distributors of the greatest portion of such gas sell the same for public consumption in the states of New Mexico, Colorado, Wyoming and in the metropolitan area of Chicago, Illinois.

On December 30, 1959, the Federal Power Commission approved an agreement movant made with all of such purchaser-distributors settling rate controversies effective since January 1, 1954. Part and parcel of such agreement was movant's undertaking:

> "A portion of the amounts paid by Colorado Interstate for gas from these sources may be refundable to Colorado Interstate in a presently indeterminable amount. Colorado Interstate will use every reasonable effort to secure refunds from its suppliers, including, without limitation of the generality of the foregoing, active prosecution of such in judicial proceedings as well as active participation to that end in the Commission's rule-making proceeding, Docket No. R-168."

The reference therein was to the question of the refundability of the amounts paid to Kansas producers under comcompulsion of the minimum price order involved in the cases at bar. The Federal Power Commission in its order of December 30, 1958, directed that movant make refunds in accordance with such undertaking in the following terms:

> "(E) In the event that Colorado Interstate receives a refund from its suppliers in the Hugoton Field of

Kansas or in the Panhandle Field of Texas of monies paid or payable for gas delivered during the period January 1, 1954 through February 4, 1958, Colorado Interstate shall make refund to its customers listed in Appendix B hereto in accordance with the settlement agreement attached hereto as Appendix A."*

Pursuant to such undertaking, and in its own interest, movant, by active prosecution of various lawsuits and settlement negotiations, had secured from its suppliers and had paid over to its customers, as of January 31, 1961, refunds totaling some $577,632. Presently pending are eight suits which movant has brought in various state courts, and federal district courts on account of diversity, to recover an additional $1,192,326. Of this amount approximately 70% would be refundable to movant's purchaser-distributors.

In one of movant's suits, an order setting pre-trial conference has been vacated pending the outcome of the instant cases. In addition, settlement negotiations in that suit and others have been deferred for the same reason.

The interest of movant, both in recoveries it may realize on its own behalf and for others, is evident from the foregoing.

Movant has followed the cases at bar through the Delaware Courts and through the certiorari process here. Based upon such knowledge, movant can in all good faith assert that it can demonstrate to this Court that suits upon equitable or common law counts are maintainable without, in any manner, disrupting the regulatory scheme envisaged by the Natural Gas Act. On the contrary, movant asserts that such suits must be maintained to prevent petitioners,

*The customers listed in Appendix B were: Citizens Utilities Company, City of Colorado Springs, City of Trinidad, Colorado-Wyoming Gas Company, Eastern Colorado Utility Company, Greeley Gas Company, Kansas-Colorado Utilities, Inc., Natural Gas Pipeline Company of America, Plateau Natural Gas Company, Public Service Company of Colorado, Pueblo Gas and Fuel Company, and Southern Union Gas Company. The reference to Appendix A is the undertaking quoted above.

and others similarly inclined, from seeking an attractive escape from legal responsibility under well established principles of law relating to contracts, quasi-contracts, and restitution. It is readily apparent that all of these matters are relevant to the Court's consideration of the cases at bar.

Respectfully submitted,

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BRIEF OF COLORADO INTERSTATE GAS COMPANY *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF COLORADO INTERSTATE GAS COMPANY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The interest of Colorado Interstate Gas Company in this case is set forth in its motion to which this brief is annexed.

Questions Presented

I. Whether, in an action brought in a state court on common law claims for the restitution and recovery under contract of sums paid under compulsion of a void state administrative order, the state court must divest itself of jurisdiction where the defendants raise, as one of many defenses, a defense based on a federal statute.

II. Whether a filing with the Federal Power Commission of an independent producer rate schedule which includes:

(1) a contract setting the price for natural gas at less than 11¢ per Mcf, but subject to all valid orders of state regulatory bodies having jurisdiction, and

(2) a copy of the Kansas Corporation Commission's 11¢ minimum price order, the validity of which at the time of filing is being contested on judicial review,

results in the establishment of an effective and unconditional rate of 11¢ per Mcf, although, upon conclusion of judicial review, the order is declared invalid for lack of jurisdiction in the Kansas Corporation Commission.

Statement of the Case

Prior to 1952 a natural gas pipeline company contracted separately with two producers for the purchase of natural gas at a wellhead price of approximately 7¢ per Mcf (thousand cubic feet).[1] Both contracts were made expressly subject to valid orders of regulatory bodies having jurisdiction (R. 79, 303). Effective January 1, 1954, a state commission, by order, fixed the minimum wellhead price for natural gas at 11¢ per Mcf (R. 262-268). Judicial review proceedings to test the validity of said order were initiated. Prior to making any payments at the ordered price, the

[1] Detailed statements of the case appear in the briefs of petitioners and respondent, Cities Service Gas Company (Cities). In the interest of simplicity, the statement herein is confined to the contract of June 16, 1949, between Texaco, Inc. (Texaco), and Cities (R. 69-81), and the contract of June 23, 1950, between Pan American Petroleum Corporation (Pan American) and Cities (R. 285-308). The reference above to a contract price of approximately 7¢ per Mcf is an approximation based on converting the operative contract prices stated in terms of a 16.4 p.s.i.a. pressure base to an equivalent price in terms of 14.65 p.s.i.a. and without regard to adjustments for BTU content. A detailed exposition of the effect of the Kansas order on the contract prices was pleaded in Cities' complaints (R. 54-55, 233).

pipeline company advised the producers by letter that, pending the outcome of the review proceedings, it would pay 11c per Mcf as ordered, but that such payments were involuntary and it would expect refund of overpayments if the minimum price order was judicially declared invalid (R. 153-154, 609-610). One of the producers agreed in writing that it would accept payment on that basis (R. 611). Both producers accepted and cashed monthly checks which were tendered subject to the refund letter and each of which contained on its face a statement to that effect (R. 168, 614).

On June 16, 1954, the Federal Power Commission, through regulations of general applicability, ordered the producers to file as rate schedules their contracts with the pipeline company and "all supplements or agreements amendatory thereof." 19 Fed. Reg. 4534 *et seq.*

Prior to December 1, 1954, each producer tendered to the Commission for filing a copy of its basic contract, as amended (R. 126, 583). The producer which had agreed in writing to make refund if the state order was declared invalid attached a copy of the state order to its filing (R. 597-598), but did not tender the letters (R. 609-611) which constitute its undertaking to make refund. The other producer did not initially tender copies of either the state order or the refund letter which it had received from the pipeline company (R. 126). In July, 1957, at the Commission's request (R. 149-150), this producer filed copies of both the state order and the refund letter (R. 152-153).

The Commission accepted the documents initially tendered by each petitioner (R. 224, 636) and so advised them by letter (R. 138-143, 640-646).

On January 20, 1958, the United States Supreme Court declared the state minimum price order invalid. *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 355 U.S. 391 (1958). The pipeline company's demand for refund was refused by the producers. Lacking diversity of citizenship, the pipeline company brought

separate suits in a state court against each of the producers for the recovery of overpayments made under the invalid state order (R. 52-59, 232-237). The claims for relief were grounded on common law counts of contract, restitution and unjust enrichment (R. 58, 236-237). In their answers (R. 59-68, 620-635) and motions for summary judgment (R. 170-171, 656-657), the producers, among other things, raised affirmative defenses and jurisdictional objections founded on the Natural Gas Act and the regulations and action of the Federal Power Commission thereunder. The state courts rejected the producers' objections to jurisdiction and held that the lawful rate for gas was the basis contract price unaffected by the void Kansas order (R. 8-21, 33-46).

SUMMARY OF ARGUMENT

I. A suit brought in a state court to recover sums paid under the compulsion of a void state administrative order is not a suit to enforce a liability or duty created by the Natural Gas Act.

The reach of the judicial power in cases arising under the laws of the United States is restricted to the enforcement of rights which derive in the first instance from federal law. Section 22 of the Natural Gas Act does not broaden the established limits of federal jurisdiction.

Cities' claims below are based on common law theories of contract and quasi-contract, both of which are available under *Natural Gas Pipe Line Company of America v. Harrington*, 246 F.2d 915 (5th Cir. 1957), *cert. denied*, 356 U.S. 957 (1958). The petitioners raise a defense based on the Natural Gas Act and couple to it the erroneous conclusion that to meet that defense, of necessity, requires the assertion of a federally created right. But the well established rule is to the contrary. To the plaintiff alone goes the choice of whether to lay its claim on common law rights or on federal rights. *Luckett v. Delpark, Inc.*, 270 U.S. 496 (1926); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 252, and dissent at 259

(1951). The interposition of a defense based on the Act did not change the nature of Cities' claims from nonfederal to federal. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). Nor does the mere existence of the Act abrogate rights arising under express or implied contracts. Under the principles announced in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), it is clear that contractual rights are not extinguished by the Act. The recent decision of this Court in *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137 (1960), establishes that contractual rights and duties exist independently of, and side by side with, the limited rights and duties imposed by the Act. The vindication of rights arising out of common law has not been placed with the federal courts by Section 22.

II. The state courts have not collaterally revised an order of the Federal Power Commission.

The case at bar is not factually parallel with *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). Petitioners' misplaced reliance thereon is but a transparent attempt to escape their legal obligations and refund liabilities behind a smokescreen purportedly raised in behalf of administrative uniformity.

Under the principles announced in *Natural Gas Pipe Line Company of America v. Harrington*, 246 F. 2d 915 (5th Cir. 1957), *cert. denied*, 356 U.S. 957 (1958), the right to recover overpayments from January 1, 1954, to at least July 16, 1954, is unassailable. Such rights, whether founded on contract or quasi-contract, were not terminated by the issuance of procedural regulations governing the filing of rate schedules by independent producers. The Commission expressly announced that the regulations were not intended to effect substantive changes in existing relationships between producers and transmission companies. 19 Fed. Reg. 8807.

The filing of rate schedules by the petitioners did not result in the establishment of an unconditional 11¢ rate as

they allege. The distinetion between producer "contract filings" and pipeline "tariff filings" establishes that the Commission did not accept an 11c tariff rate, but accepted only the documents tendered. From these documents the applicable rate is to be determined. Any right to an 11c rate depends on the effectiveness of the Kansas order to modify the basic contracts between Cities and the petitioners. Since the Kansas order was void *ab initio*, the determinable filed rates were the contract rates and no others. The state courts have not collaterally revised a filed rate and have not "enforced" a filed rate. Within the authority of *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922), the courts have examined the petitioners' rate schedules and have correctly determined that the rate provided for therein is the contract price, rather than the price purportedly set by a void order of the Kansas Corporation Commission.

ARGUMENT

I. The causes of action below for recovery of sums paid under compulsion of a void state price order were not actions to enforce a liability or duty created by the Natural Gas Act.

A. Constitutional and Statutory Provisions Involved.

Section 22 of the Natural Gas Act, 52 Stat. 833, 15 U.S.C. 717u, is set out in the appendices to petitioners' briefs. In connection with Section 22 of Act, the following portion of U.S. Const. Art. III, § 2 is pertinent:

> "The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . ."

B. Delineating the Area of Jurisdiction in Cases Arising Under th Laws of the United States.

1. A brief historical perspective revealing the restrictive nature of federal question jurisdiction.

The constitutional grant of "judicial Power" defines the upper limit of what has come to be popularly called "federal question" jurisdiction. The statutory implementation of that jurisdictional grant may not exceed, but need not be coextensive with, the constitutional limit. The statutory development of federal question jurisdiction exhibits the historical expansion and contraction of the jurisdiction of federal questions within the limits established by the Constitution.

Under the First Judiciary Act, Act of September 24, 1789, 1 Stat. 73, private litigants had no right of original entry to the federal courts for the vindication of federally created rights. Original resort was to the state tribunals subject to limited review by the United States Supreme Court "where is drawn in question" the validity or construction of any statute of the United States. Until after the Civil War, private litigants, in the absence of diversity of citizenship, had access to the federal courts only in exceptional cases of a peculiarly federal nature.[2] The period following the Civil War was a period of expansion of federal question jurisdiction[3] culminating in the Judiciary Act of 1875, Act of March 3, 1875, 18 Stat. 470. It was this act which "first entrusted to the lower federal courts wide jurisdiction in cases 'arising' under this Constitution, the Laws of the United States, and Treaties.' U.S. Const. Art. III, § 2." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950). Since the passage of the Act, Congress has in-

[2]E.g., Revocation of wrongfully secured patents, Act of April 10, 1790, 1 Stat. 109; patent infringement, Act of Feb. 21, 1793, 1 Stat. 318; veterans' disability pensions, Act of March 23, 1792, 1 Stat. 243.

[3]E.g., The various Civil Rights Acts, Act of April 9, 1866, 14 Stat. 27; Act of May 31, 1870, 16 Stat. 140; Act of Feb. 28, 1871, 16 Stat. 433; Act of April 20, 1871, 17 Stat. 13; Act of March 1, 1875, 18 Stat. 335; suits against national banks, Act of June 3, 1864, 13 Stat. 99; removal jurisdiction of suits against corporations organized under a law of the United States, Act of July 27, 1868, 15 Stat. 226; treble damage suits for violation of Pacific Railroads Act, Act of June 20, 1874, 18 Stat. 111.

corporated both concurrent and exclusive federal jurisdictional provisions in many of its substantive statutes[4] without regard to whether or not such jurisdiction was already existent under the Judicial Code (28 U.S.C. §§ 1331-1359). Even though the number of statutes implementing the Constitutional "judicial Power" has gradually multiplied, access to the federal courts thereunder has been restricted under well established doctrines as to when a case does or does not "arise" under federal law.

2. An action does not arise under federal law if the federal question enters only by way of defense.

An action does not arise under federal law if the federal question enters only by way of defense even though artful pleading by the plaintiff anticipates a defense based on the federal law. *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). And, if the source of the right sought to be enforced is not in the first instance from federal law, there is no federal question even though enforcement of the rights in question may be prohibited by some act of Congress or may be specifically permitted by some act of Congress. *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936).

That the statutory grant of federal jurisdiction is exclusive rather than concurrent does not change the fact that an action, founded in law on contract or in equity on unjust enrichment, is not an action arising under federal law simply because a federally created right may be an ingredient of the legal position asserted by the defendant.[5]

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[4] See reviser's notes to 28 U.S.C. § 1331.

[5] 28 U.S.C. § 1338(a) places exclusive jurisdiction in the federal courts of any civil action arising under federal patent and copyright laws. But an action on a contract, the subject of which is a patent, is cognizable in the state courts. Jurisdiction of state courts upheld in: *Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255 (1897), action by patentee for purchase price of patented machine wherein was raised a defense that plaintiff's patent was void and that use of machine would infringe another patent; *New Marshall Engine Co. v. Marshall Engine Co.*, 223 U.S. 473 (1912).

The decision in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950) clearly illustrates the distinction made, for jurisdictional purposes, between rights which arise under the Natural Gas Act and rights which arise under contract, where the enforcement of the contract right is dependent upon a construction of the Act and certain action of the Federal Power Commission pursuant thereto. In the *Skelly* case, plaintiffs invoked the Declaratory Judgment Act, 48 Stat. 955, 28 U.S.C. § 2201, seeking a declaration that certain gas purchase contracts between Phillips and the petitioners were binding and effective. As to the defendants with whom diversity was lacking, federal jurisdiction had been premised on the allegation that whether or not a certificate of public convenience and necessity had been issued by the Federal Power Commission to Michigan-Wisconsin Pipe Line Company presented a federal question. The federally created certificate right was an essential ingredient of the plaintiff's claim since the contracts before the Court allowed termination by the petitioners in the absence of such certificate. As to parties not of diverse citizenship, the Court held that there was present no federal right which provided a foundation for resort to the federal courts, reasoning:

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suit for specific performance of contract to assign a patent when issued coupled with a bill for an injunction against maufacture and sale under patent; *Becher v. Contoure Laboratories, Inc.*, 279 U.S. 388 (1929), suit to have patentee declared trustee ex maleficio of a patent and to compel its assignment to plaintiff; *Friedman v. Washburn Co.*, 145 F.2d 715 (7th Cir. 1944), diversity jurisdiction, court rejected prayer for assignment but held a case had been stated for accounting and damages not under patent laws but on equity principle of unjust enrichment. Cf. *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22 (1913). See also the cases involving land rights where there is no federal question even though the source of title is a United States Patent. E.g., *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900), adverse suit to determine patent applicant's right to possession; *Joy v. St. Louis*, 201 U.S. 332 (1906), ejectment to secure to owner under a patent possession of land formed by accretion after issuance of patent; *Marshall v. Desert Properties Co.*, 103 F. 2d 551 (9th Cir. 1939), *cert. denied*, 308 U.S. 563 (1939), quiet title action by patent holder. Cf. *Hopkins v. Walker*, 244 U.S. 486 (1917).

> "If Phillips sought damages from petitioners or specific performance of their contracts, it could not bring suit in a United States District Court on the theory that it was asserting a federal right. And for the simple reason that such a suit would 'arise' under the State law governing the contracts. Whatever federal claim Phillips may be able to urge would in any event be injected into the case only in anticipation of a defense to be asserted by petitioners." 399 U.S. at 672.

The Court commented pointedly on the restrictive nature of jurisdiction founded on federal rights, saying:

> ". . . With exceptions not now relevant Congress has narrowed the opportunities for entrance into the federal courts, and this Court has been more careful than in earlier days in enforcing these jurisdictional limitations. See *Gully v. First National Bank*, supra at 113.
>
> "To be observant of these restrictions is not to indulge in formalism or sterile technicality. It would turn into the federal courts a vast current of litigation indubitably arising under State law, in the sense that the right to be vindicated was State-created, if a suit for a declaration of rights could be brought into the federal courts merely because an anticipated defense derived from federal law." 339 U.S. at 673.

C. The Case at Bar does not Arise under Federal Law.

1. Cities seeks relief in money damages, at law under contract or, alternatively, in equity under restitution.

In determining whether or not a given case arises under federal law, the plaintiff's complaint is the focal point of the inquiry. *Skelly Oil Co. v. Phillips Petroleum Co., supra*, 339 U.S. at 672 and cases cited. The complaints filed by Cities in the case at bar do not assert a right to recovery founded on

federal law in general or the Natural Gas Act in particular. Said complaints simply seek to recoup amounts paid by Cities in excess of agreed-upon prices. Quite obviously relying on the teaching of *Natural Gas Pipeline Company of America v. Harrington*, 246 F.2d 915 (5th Cir. 1957), *cert. denied*, 356 U.S. 957 (1958), Cities pleaded alternate grounds for recovery (R. 52-59, 232-237). It was asserted that by receiving and retaining payments pursuant to the letter of January 21, 1954, petitioners contracted to refund overpayments as, if and when the Kansas order was judicially declared invalid. Alternatively, it was asserted that overpayments were made involuntarily under such duress as to allow recovery on a restitution theory (R. 58, 236-237).[6] The Natural Gas Act apart, there is no question of the fact that Cities sought vindication of certain rights which are not federally created. The fact that, under the circumstances of the case at bar, Cities might have been able to assert a right arising out of the Act does not in any sense diminish its co-existent and independent right to rely on common law grounds for recovery. It is well settled that, where the same circumstances give rise to both common law and federal rights, the choice of which set of rights to assert in a cause of action rests exclusively with the plaintiff. *Luckett v. Delpark, Inc.*, 270 U.S. 496 (1926); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 252, and dissenting opinion at 259 (1951).

2. The Natural Gas Act enters the case only by way of defense.

Petitioners answered the complaints filed by Cities pleading, among other things, that after June 7, 1954 (or after July 16, 1954), the only lawful rates were the rates filed with the Federal Power Commission (R. 59-68, 620-635). This would seem to be an assertion only of the estab-

[6] The right to restitution of overpayments made under an administrative rate order later judicially declared invalid is well established. *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134 (1919); *Baltimore & O.R.R. Co. v. United States*, 279 U.S. 781 (1929).

lished principle that, where the rate in a private contract and the rate on file with the regulatory authority differ in amount, the filed rate prevails. This is no more than the assertion of a defense based on federal law i.e., recovery is precluded because a new and different filed rate (11c) has superseded the old contract rate. But, for jurisdictional purposes, the petitioners claim much more. Petitioners assert that, under the Natural Gas Act, the contract has lost all vitality as a contract, *ergo*, even though the contract and the filed rate be identical, petitioners have no contractual or common law obligations toward Cities. By this reasoning, petitioners erroneously conclude that the enforcement provisions of the Act have been substituted for the well-defined common law rights to recover, on contract or quasi-contract, sums paid under compulsion and duress. Cities was and is seeking recovery on an affirmative obligation of the petitioners to make refund, which arises out of contract, express or implied, not out of any liability or duty created by the Natural Gas Act. The source of Cities' right to recovery does not derive in the first instance from federal law. The Act enters the case only by way of defense to Cities' common law claims.

3. The Natural Gas Act does not substitute federal rights for contract rights; it preserves the integrity of contracts.

Implicit in petitioners' jurisdictional arguments is the contention that the Natural Gas Act has extinguished contract rights, as such, whether express or implied. The contrary is true. Contracts between producers and transmission companies, even though filed with the Federal Power Commission, remain in force and effect unless and until changed or modified by the Commission pursuant to its authority under the Act. Similarly, the common law rights and obligations of the contracting parties which exist or may later arise by operation of law remain viable. Such rights and obligations are not extinguished by the Act nor does the Act substitute federally created rights therefor.

This Court is acquainted with the myriad of obligations contained within the four corners of "a full-fledged contract containing all the terms defining the complete relationship (between producer and transmission company)." *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 273 (1960). In *Shell* this Court examined such a contract and, after quoting the introductory language thereof, reported:

> "What follows are the nine Articles which detail the many aspects of the parties' relationship for the 20-year term of the contract. The Articles are captioned 'Sale of Gas,' 'Quantity of Gas,' 'Pressure Decline,' 'Point of Delivery,' 'Warranty of Title to Gas,' 'Prices,' 'Arbitration,' 'Term of Contract' and 'Miscellaneous.' In addition an exhibit made part of the contract deals with such matters as 'Quality of Gas,' 'Measurements,' 'Billing and Payment,' 'Regulatory Bodies' and 'Force Majeure.' " 363 U.S. at 273.

Under petitioners' theory, a duty or liability arising under or involving, no matter how remotely, any of the quoted subjects is a creation solely of the Natural Gas Act and thus enforceable in the federal courts exclusively. Petitioners cannot limit their "created by" theory to the price provisions of such a contract for the simple reason that each and every provision therein does, in some manner, "affect or relate to such rates, charges, classifications, and services." § 4(c), Natural Gas Act.

The court below rejected petitioners' contentions, citing *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) for the proposition that the Natural Gas Act does not abrogate private rate contracts as such. That was clearly a proper reading of the *Mobile* case. An examination of the opinion in *Mobile* establishes that this Court was not concerned with changes in rates which derived their binding effect from the Natural Gas Act but with rates which were binding because of valid contracts. The contract in *Mobile* had been filed with the Federal Power Commission and as the Court noted ". . . with the approval

of the Commission, became a part of United's filed schedules of rates and contracts." 350 U.S. at 336. Nevertheless, Mobile's right to pay only the contract rate unchanged by any unilateral action on the part of United was a right arising under its contract, not a right created by the Natural Gas Act. This was made unmistakably clear in the case which followed *Mobile* to this court, *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958). The distinction which prevented a unilateral rate change in *Mobile* while allowing it in *Memphis* was a distinction based solely on the different contractual obligations of the parties concerned. In *Mobile* the right to change rates unilaterally "had been bargained away by contract," while in *Memphis* the seller was "contractually" free to change its rate from time to time. 358 U.S. at 110-111.

Petitioners' contention that contract rates, as such, do not survive the Natural Gas Act is erroneous. *Mobile* is but a recent affirmation of the established principle that contracts not outlawed but merely subjected to regulatory legislation remain in full force and effect.[7] *Mobile* simply applied such principles to the specific question of whether a natural gas company furnishing gas under a long-term contract "may, without the consent of the distributing company, change the rate specified in the *contract*."[8] 350 U.S. at 334. The Court held that the Act does not give companies "the right to change their rate *contracts* by their own unilateral action", 350 U.S. at 337, a holding which it characterized as "preserving the integrity of *contracts*." 350 U.S. at 344.

[7] See *Wichita R. & Light Co. v. Public Utilities Commission*, 260 U.S. 48 (1922); *Southern Utilities Co. v. City of Palatka*, 268 U.S. 232 (1925); *Colorado Interstate Gas Co. v. Federal Power Commission*, 142 F. 2d 943 (10th Cir. 1944) *aff'd.* 324 U.S. 581 (1944).

[8] In this brief emphasis has been supplied unless otherwise indicated.

4. The producer-transmission company relationship is recognized as a dichotomy, composed in part of rights and duties arising under contract, and in part of rights and duties arising under the Natural Gas Act.

The survival of contract rights as such is clearly illustrated by the cases which have lately followed in the wake of *Mobile*. The recent decision in *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137 (1960), clearly points out that the producer-transmission company relationship is dichotomous, composed in varying parts of obligations imposed by contract and obligations imposed by the Natural Gas Act. In that case a producer had applied to the Federal Power Commission for a certificate of public convenience and necessity limited in time to the duration of its contract with the transmission company. The Commission tendered instead a certificate without time limitation which the producer accepted reserving its right to urge, on judicial review, objections to the certificate's unlimited nature. In sustaining the Commission this Court took pains to distinguish between the obligations of the producer which arise out of its contract and those which arise out of the Natural Gas Act. The Court stated the distinction as follows:

> "The Commission's practice supports its authority here in terms of § 7(e). It has long drawn a distinction between the underlying service to the public a natural gas company performs and the specific manifestation—the contractual relationship—which that service takes at a given moment. . . .This position of the Power Commission is evidence that the service in which the producer engages is distinct from the contract which regulates his relationship with the transmission company in performing the service." 364 U.S. at 152-153.

The Court then specifically dealt with the interrelation between contract obligations as such and Natural Gas Act obligations as such. After recognizing that "the scheme of

the Act was one which built the regulatory system on a foundation of private contracts", 364 U.S. at 154, the Court pointed out how one obligation--the duty to deliver gas to the transmission company—was an obligation arising out of the contract during its term and that, only after the contract expires, can that duty be said to arise under the Natural Gas Act. The Court said:

> "It is apparent that the Commission's order in no way violated the integrity of petitioner's contract with United. During its term, both parties are bound by it to the same extent as any members of this regulated industry. When it expires, petitioner, to be sure, will be under an obligation to continue to deliver gas to United on the latter's request unless it can justify an abandonment before the Commission; but we do not see how this in any way disturbs the integrity of the contract during its term. The obligation that petitioner will be under after the contract term will not be one imposed by contract but by the Act. It will be free then, as it was not free during the contract term under the contract here in question, to make rate changes under § 4 without United's consent . . . .
>
> "The short of the matter is that *Mobile* recognized that there were two sources of price and supply stability inherent in the regulatory system established by the Natural Gas Act—the provisions of private contracts and the public regulatory power . . . ." 364 U.S. at 155.

The extent to which a contract as such governs the relationship between a producer and a transmission company was also graphically illustrated by this Court's recent decision in *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263 (1960). The question there presented was whether or not a "favored-nations" clause in the gas purchase contract between Texas Gas and Shell had become operative so as to increase the contract price prior to June 7, 1954. Shell

had alleged that a price adjustment in a 1943 contract between Texas Gas and Atlantic Refining Company had "triggered" the "favored nation" clause in the Texas Gas-Shell contract. This Court held that the "favored nation" clause was dependent on a *new* contract being entered; that the price adjustment between Texas Gas and Atlantic was not a new contract but was "simply executory of the (1943) contract between the parties" 363 U.S. at 272; and that, therefore the "favored nation" clause in the Texas Gas-Shell contract had not been activated. The presiding examiner, the Commission (18 F.P.C. 617), the Court of Appeals for the Third Circuit (263 F.2d 223) and this Court all made their respective determinations on the basis of the applicability of principles of contract interpretation, not on the basis of statutory construction of the Natural Gas Act. Moreover, this Court remanded the case to the Court of Appeals with directions that that Court determine whether the question of enforceability of the 1943 Texas Gas-Atlantic contract was material, and, if found to be material, to determine the question of enforceability, presumably "under applicable state law" 363 U.S. at 276-277.[9]

Thus, a private contract between a producer and a transmission company is neither "outlawed" nor "legalized" by the Natural Gas Act. True, under the procedures prescribed in the Act, the Commission does have paramount power to modify private contracts when the public interest so requires, but, unless and until so modified, a contract remains binding and enforceable upon the parties as a contract. The Act in and of itself did not abolish or change the nature of

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[9] The extensive litigation involving Pennsylvania Water & Power Co. is a prior example of the juxtaposition of duties and liabilities in a given situation which arise variously under private contract, federal regulatory and anti-trust law, and state corporation law. Cf *Pennsylvania Water & P. Co. v. Federal Power Commission*, 343 U.S. 414 (1952); *Pennsylvania W. & P. Co. v. Consolidated G., E., L. & P. Co.*, 184 F.2d 552 (4th Cir. 1950), *cert. denied*, 340 U.S. 906 (1950), *supplemental opinion* 186 F.2d 934 (1951); *Consolidated Gas, E., L. & P. Co. v. Pennsylvania W. & P. Co.*, 194 F.2d 89 (4th Cir. 1952), *cert. denied*, 343 U.S. 963 (1952).

existing contractual or common law rights. To once again use the words of *Mobile*, the Act simply "affords a reasonable accommodation between the conflicting interest of contract stability on the one hand and public regulation on the other", 350 U.S. at 344. In sum, the petitioners' position is that contractual and even quasi-contractual obligations not abolished by the Act are necessarily "created by" it. But the "reasonable accommodation" envisioned in *Mobile* does not demand that existing jurisdictional limitations be so strained by committing to the exclusive control of the federal courts all cases involving sales covered by gas purchase contracts between producer and transmission company.

It is patently clear then, from earlier decisions of this Court, that the filing of producer-transmission company contracts with the Federal Power Commission under the provisions of the Natural Gas Act does not mark the demise of such contracts, nor the extinguishment of legal and equitable rights otherwise accruing to the parties with respect to operations under, or related to, such contracts. The suits instituted by Cities for recovery of sums paid in excess of its contract price are not suits to enforce a liability or duty created by the Natural Gas Act. Section 22 of the Act does not divest the state courts of jurisdiction.

II. The state court has not collaterally reviewed and set aside a filed rate.

A. The *Montana-Dakota* case Does Not Aid the Petitioners.

Petitioners see in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), an attractive escape from the liability to make refund which arises out of well established principles of law relating to contracts, quasi-contracts and restitution. Against the background of *Montana-Dakota* petitioners erect a mass of assorted horrors which are said to lead to the inevitable destruction of the federal regulatory structure. *Montana-Dakota* does not support petitioners' thesis in the case at bar, nor would the affirmance of the courts below cause the collapse of federal regulation.

In *Montana-Dakota* the issue which the plaintiff attempted to raise was the inapplicability, due to unreasonableness, of rates set forth in a contract on file with the Federal Power Commission. 341 U.S. at 248. In the case at bar there is no issue as to reasonableness or unreasonableness; and it is the petitioner-defendants who raise an issue concerning the inapplicability of rates set forth in a contract on file with the Federal Power Commission.

The claim in *Montana-Dakota* was for vindication of a "federally conferred right to reasonable rates and charges". 341 U.S. at 249. Allegations of fraud were not the basis of the claim but were the excuse offered by the plaintiff "to escape the limitations of the Power Commission remedies". 341 U.S. at 250. Moreover, the Court pointed out the fact that, under the factual circumstances of the case, the plaintiff probably did not have a cause of action in fraud, independent of the Power Act, because "the issue of reasonableness of the charges is not one clearly severable from the issues of liability, for the acts charged do not amount to fraud unless there has been an unreasonable charge." 341 U.S. at 253-4. *Montana-Dakota* is opposite rather than ap-

posite to the case at bar. Here, Cities claims are for vindication of well established common law rights which exist independently of the Natural Gas Act. The petitioners bring in the matter of filed rates as a bar to recovery by Cities on the premise that the filed rate "can be no other" than what petitioners say it is. In succeeding paragraphs it will be demonstrated that the filed rate defense is not a bar to recovery because the filed rate is not 11c, petitioners' insistence on 11c notwithstanding.

Finally, petitioners' fear, that survival of the federal regulatory scheme is imperiled unless they are allowed to be unjustly enriched, is groundless. Retroactive payments and refunds pursuant to contracts and letter agreements between producers and transmission companies have been made heretofore without, in any way, affecting the repose of the natural gas industry. *Phillips Petroleum Co. v. Federal Power Commission*, 227 F.2d 470 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956); *Kerr-McGee Oil Industries, Inc. v. Federal Power Commission*, 260 F.2d 602 (10th Cir. 1958).[10]

In the case at bar the prevention of petitioners' unjust enrichment will serve, not disserve the public interest, since Cities' jurisdictional customers will be the immediate beneficiaries of the major portion of any refunds recovered. *Re Cities Service Gas Co.*, 15 F.P.C. 1448, 1453-58 (1956).[11]

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[10] Both cases involved contracts in which the prices payable to producers were tied into the resale rates of the purchasing transmission companies. The resale rates were not determined until after June 7, 1954, but covered periods beginning in 1952 and 1953. In *Phillips* a refund was due from the producer to the transmission company because the latter's application for increase was only partially allowed. The court noted that refund had been made and did not even intimate that this was improper. In *Kerr-McGee* an additional payment was due the producer. Payment had been made for all periods up to June 7, 1954, and the gathering company stood ready to make payment for subsequent periods. In 1956, the producer filed a motion to correct its billing statement retroactive to June 7, 1954 to reflect the proportional contract increase due to final determination of the transmission company's resale rates. The court held that the Commission erred in denying the motion.

[11] See *infra*, p. 38.

B. Cities' Right to Restitution and Refund for the Period January 1, 1954, to July 16, 1954, is Unassailable.

Prior to January 1, 1954, the price for gas sold by petitioners to Cities was governed solely by the pricing provisions set forth in the gas purchase contracts. This price was somewhat below 11c per Mcf. (R. 74-75, 298).

On January 1, 1954, the Kansas minimum price of 11c per Mcf became effective by order of the Kansas Corporation Commission. Putting aside the effect of the order *per se*, the contract price would, on that date, have been advanced to 11c per Mcf by operation of the contractual provision which expressly made the contracts subject to valid orders of regulatory bodies having jurisdiction, *provided* that one condition was met. The condition, of course, was that the order be valid.

By letter, Cities advised the petitioners that it would comply with the order pending final judicial determination of its validity. Thus was provided a mode through which the basic contractual relationship would continue pending judicial review, that is, until the contract price was ultimately determined by a final judicial decision on the Kansas order, Cities would make interim payments at the rate of 11c per Mcf. Thus the letter agreements are "merely executory of the contract between the parties" and, together with the basic contracts, in each case "are all integrated parts of one contract". *Phillips Petroleum Co. v. Federal Power Commission*, 227 F. 2d 470, 475, 476 (10th Cir. 1955); *cert. denied* 350 U.S. 1005 (1956); *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263 (1960); Cf. *Pan American Petroleum Corp. v. Federal Power Commission*,——F. 2d—— (10th Cir., January 31, 1961, No. 6324).

The Kansas order was ultimately declared void *ab initio*. *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 355 U.S. 391 (1958); *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 184 Kan. 540, 337 P. 2d

640 (1959), *cert. denied*, 361 U.S. 836 (1959). Thus the contract price had never been advanced to 11c per Mcf.

It is clear that, under conventional doctrines of restitution, Cities was entitled to recover the difference between the contract rate for gas purchased from the petitioners and the price paid under the invalid Kansas order at least from January 1, 1954, to July 16, 1954. *Natural Gas Pipe Line Company of America v. Harrington*, 246 F. 2d 915 (5th Cir. 1957), *cert. denied*, 356 U.S. 957 (1958). The *Harrington* case awarded restitution based on the invalidity of the Oklahoma minimum price order. The restitution period in that case began on September 10, 1952, and continued to July 1, 1954. No event has taken place which could cut off Cities' right to restitution prior to July 1, 1954.

It remains to be seen whether or not Cities' right to restitution was aborted on or after July 16, 1954, by Federal Power Commission interdict.

C. The Producer Regulations Were Procedural Only. The Issuance Thereof Did Not Terminate Cities' Refund Rights As Of July 16, 1954.

In the *Harrington* case, *supra*, it is clear that the right to restitution which Cities asserts does not end on June 7, 1954, as a consequence of this Court's decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), issued that day. One of the consequences which did flow from the *Phillips* decision was the issuance, on July 16, 1954, of Federal Power Commission Order No. 174, 19 Fed. Reg. 4534 *et seq.*, prescribing regulations for the filing of rate schedules and certificate applications by independent producers.[12]

The regulations were procedural only and had no effect whatsoever on the substantive rights of parties affected

[12] Order No. 174 was superseded by Order No. 174-A, 19 Fed. Reg. 5081 *et seq.* Order No. 174-A was modified by an order issued September 24, 1954, which extended certain filing dates from October 1, 1954, to December 1, 1954, 19 Fed. Reg. 6301, and was further amended by Order No. 174-B, issued December 17, 1954, 19 Fed. Reg. 8807 *et seq.* The producer regulations now appear at 18 C.F.R. § 154.91 *et seq.*

thereby. In its opinion filed with Order No. 174-B, the Commission stated:

> "Many of the petitions for rehearing, although objecting to the lack of notice when the rules were originally adopted, recommended changes which would be of a distinctively substantive nature. Substantive rules, however, do not appear desirable in connection with the filings with which these rules are concerned and it is the intention of the Commission to relate these rules strictly to procedural matters." 19 Fed. Reg. 8807.

Commissioners Smith and Steuck, in a concurring opinion, characterized the entire series of Orders Nos. 174, 174-A and 174-B as "a properly pragmatic approach to the problems entailed in its (Commission's) newly defined jurisdiction in the areas of production and gathering." Fed. Reg. Doc. 54-10160. Thus the Commission documented its intention to limit the scope of the regulations to those procedural matters necessary to initiate the regulatory process. The mere issuance of the regulations then, did not change in any manner the contractual relationship between Cities and the petitioners, much less establish a cut-off date as respects Cities' common law rights to restitution.

D. The Commission Took No Action Under the Regulations Which Terminated or Extinguished Cities' Refund Rights.

1. The basic distinction between producer contract filings and pipeline tariff filings rebuts the contention that petitioners filed a stated and unconditional rate of 11c.

In point of time the producer regulations were "applicable to transactions and operations conducted on and after June 7, 1954, the date of the Supreme Court decision in the Phillips Petroleum Company case." 19 Fed. Reg. 4535. On June 7, 1954, the transaction and operation being conducted between Cities and each of the petitioners was the

purchase and sale of natural gas at a price level which was dependent upon the validity or invalidity of the Kansas minimum price order. The petitioners, Pan American expressly in writing, and Texaco by its conduct, had agreed to refund to Cities the difference between contract price and the 11c interim price being paid pending judicial review of the Kansas order. The petitioners now assert that their compliance with the producer regulations not only excused their performance of the agreements to make refund, while at the same time extinguishing Cities' right to judicially enforce such agreements, but also effectively terminated Cities' common law rights to restitution of payments made under the compulsion of a void administrative order.

The process by which petitioners seek to pervert the federal regulatory process to suit their purposes begins with the assertion that the Commission accepted for filing a stated rate of 11c per Mcf. This assertion completely ignores the fundamental difference between a pipeline rate schedule and an independent producer rate schedule. The former is a flat statement of an applicable rate in terms of cents per unit, 18 C.F.R. §§ 154.11, 154.38(d). The latter consists of "the basic contract and all supplements or agreements amendatory thereof, . . . showing . . . the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges." 18 C.F.R. § 154.93. There thus exists a basic distinction between a pipeline "tariff filing" and a producer "contract filing".[16]

[16] The distinction between a "contract filing" and a "tariff filing" has been presented to, and considered by, this Court, in a previous case. See *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, 115 note 8 (1958); and Brief for Federal Power Commission in the *Memphis* case at pp. 3-6 and 89 note 56. In directing independent producers to make a "contract filing" the Commission was doing exactly what it had originally done with respect to pipeline rate schedules. Compare 18 C.F.R. § 154.93; and § 54.1, Provisional Regulations Under the Natural Gas Act, 18 C.F.R. § 54.1 (1938 Supp.). For a history of the conversion of pipeline rate forms from contracts to tariffs, see 13 Fed. Reg. 6371-2.

Each of the petitioners, in essence, contends that it tendered and the Commission accepted a stated *tariff* rate of 11c per Mcf applicable to the sale of gas to Cities. This is simply not so. Actually, each tendered certain documents which the Commission accepted as rate schedules. Regardless of what statements the petitioners claim to have made concerning an unconditional 11c rate, it is clear that the only "applicable and effective rate . . . under the rate schedule, was to be determined by the terms of the contract . . . even though the rate payable under the contract was contingent . . . and the price actually being paid by the purchaser to the seller on June 7, 1954, was not the applicable and effective rate on that date under the rate schedule." *Phillips Petroleum Co. v. Federal Power Commission*, 258 F. 2d 906, 917 (10th Cir. 1958).

Substantively, the case at bar is strikingly parallel. The rate payable to petitioners by Cities under its contracts was contingent upon the validity of the Kansas order, and had been so contingent since January 1, 1954. When this Court struck down the Kansas order it was determined that the rate stated in the contract was not and had never been legally modified by that order. *Cities Service Gas Co. v. Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958), *cert. denied*, 358 U.S. 837 (1958).

Despite the fact that producer rate schedules are composed of contracts from which the applicable rate is to be determined, petitioners vigorously assert that they tendered a tariff statement of 11c per Mcf and that the Commission construed, established and accepted an effective and unconditional 11c rate. The Commission's actions negate any inference that it so modified the contractual relationship between the parties and, in the bargain, terminated both the petitioners' obligations to make refund and Cities' rights to restitution of interim payments made under the Kansas order.

The petitioners tendered certain documents to the Commission for filing. The Commission accepted not a stated

rate of 11c per Mcf, but only the tendered documents which it characterized as "rate filings" and which it identified under the caption "Description of Document," (R. 138-143, 640-646). The Commission did not undertake to construe the legal effect of the described documents. The petitioners were advised that acceptance for filing was not to be construed as approval of any "practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith". (R. 139, 640-641).

According to petitioners the acceptance letter was a Commission order which established an 11c rate irrespective of the invalidity of the Kansas order. Further, and again according to petitioners, the acceptance letter completely abrogated the refund obligations expressly undertaken by Pan American and impliedly undertaken by Texaco. Finally, straining this apparently non-committal document to the limit, petitioners insist that it also aborted Cities' common law right to restitution which would otherwise have been born on January 20, 1958. Ingenious though these arguments be, it is small wonder that the Delaware courts have refused to accept the petitioners' eclectic view of the consequences of federal regulation. The rate schedules of the petitioners do not establish an unconditional 11c rate. The Kansas order was accepted only for what it might be worth as a valid order. The invalidity thereof having been established *ab initio*, the effective filed rate can only be the rate set forth in the basic contracts.

2. **The mere filing of documents with the Federal Power Commission does not insulate them from examination by a state court.**

Petitioners, in a variety of interrelated arguments, assert that the Delaware courts have collaterally reviewed and reversed an order of the Federal Power Commission. These arguments are all premised on the erroneous contention that their rate filings were, in form, tariffs stating an unconditional rate of 11c. An examination of the filings reveals

otherwise. In this connection let one contention of the petitioners be put to rest, namely, the implication that documents once filed with the Federal Power Commission are thereby insulated from judicial examination. No court (other than a Court of Appeals) they argue has the right to an interpretive look at the filed documents, for the purpose of determining how said documents affect the legal relationship and rights of parties concerned therewith. This argument has been rejected and it is settled that a court may look to documents on file with a regulatory body, determine the proper construction thereof, and apply that construction to the facts before it. In *Great Northern Ry. Co. v. Merchants' Elevator Co.*, 259 U.S. 285 (1922), a shipper brought suit in a state court in Minnesota to recover wrongfully exacted reconsignment charges. The carrier's filed tariff included a rule which levied a reconsignment charge of $5.00 per car as well as a supplement which excepted certain shipments from the rules. "Whether the charge was payable depended solely upon a question of construction; that is whether the body of the rule or the exception to it applied." 259 U.S. at 289. The carrier objected to the jurisdiction of the state court to decide that question. Judgment for the shipper was affirmed by the state supreme court. On certiorari, this Court affirmed both the jurisdiction of the state court and the correctness of its decision, saying:

> ". . . Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff, which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary." 259 U.S. at 294.

In the case at bar Petitioners do not really object to the Delaware courts' examination of the documents on file

with the Federal Power Commission. By way of defense to Cities' claims, petitioners requested the Delaware courts to look to the filed documents. Their real objection is that the courts' construction and application thereof does not accord with their own. It is in this connection that the much overworked plea for administrative uniformity is raised. Petitioners foresee a complete loss of repose in the industry if the state courts are allowed, in cases of disputed construction, to determine what the rate or charge is which the tariff prescribes. This argument carries no greater weight now than it did when rejected by this Court in the *Great Northern* case:

> "This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured." 259 U.S. at 290-1.

3. **There has been neither a Commission proceeding nor a Commission order changing the rate to Cities from a conditional 11c per Mcf to an unconditional 11c per Mcf.**

A realistic review of the undisputed facts in the case at bar shows conclusively that the doctrine of exhaustion of administrative remedies has never been brought into play; thus Section 19 of the Natural Gas Act should have no application herein.

As has been shown, the filing regulations promulgated in the No. 174 series of orders were intended by the Commission to relate strictly to procedural matters. The regulations required petitioners to file the contracts between themselves and Cities; however, there are no provisions for notice to Cities of such filing or the contents of such filing. The regulations contain no provision for a "proceeding" in respect of such filings and, in the cases at bar, no "proceeding" was in fact held. The assertion that the form letters mailed to petitioners, but never mailed to or served upon Cities, are orders entered in a proceeding to which Cities was a party strains credulity to the utmost.

The further assertion that such letters ordered a change in the relationship between Cities and petitioners from 11c per Mcf subject to refund, to 11c per Mcf not subject to refund, requires complete disregard of the cautionary language advising that acceptance for filing was not to "be construed . . . as constituting approval of any rate . . . nor . . . be deemed as recognition of any claimed contractual right or obligation associated therewith . . . " (R. 139, 640-641). Cities' claims are based *inter alia* upon a "claimed contractual right or obligation" on the part of the petitioners to refund the difference between the stated contract prices and the 11c price set by the void Kansas order. Can it be said that the form letters of acceptance, had they been served upon Cities, fairly advised that the Commission was thereby ordering an abrogation of the condition refund obligation of the petitioners?

The vulnerability of the common position asserted by the petitioners is all the more evident when the dissimilarity of their respective rate filings is examined. Pan American initially tendered its contract with Cities, as amended, and attached as an exhibit thereto a copy of the Kansas order. (R. 593-599). Pan American conveniently omitted tendering the refund letter agreements either as contract amendments or as exhibits. Texaco, on the other hand, did not initially tender a copy of the Kansas order, but offered only its

contract with Cities, as amended, together with billing statements which bore a notation that volume measurement and rate price were computed in accordance with the Kansas order. (R. 126, 130-138). Almost two years later, on July 12, 1957, the Commission advised Texaco by letter, that review of its rate schedules "discloses no documents therein as constituting specific authorization of the rate of 11c per Mcf at 14.65 p.s.i.a.". (R. 149). Texaco was further advised that subsequently tendered rate filings would not be accepted until Texaco filed, for each rate schedule, two copies of the Kansas order, *and* "all papers related thereto exchanged with the buyer as, for example, any agreement by the buyer to pay the related rate on a contingent or conditional basis, . . . " (R. 150). In response, Texaco tendered two copies of the Kansas order and "Two (2) copies of a letter dated January 21, 1954, from the Buyer, Cities Service Gas Co., setting forth the contingent or conditional basis upon which the minimum rate will be paid." (R. 152-153).

The petitioners, in pursuit of their common purpose to avoid refund obligations, seek to minimize any differences in their respective filings. Nonetheless they are forced to travel widely divergent paths in their arguments. For instance, Pan American asserts that the void Kansas order, not agreed to by Cities, is effective because filed, while the refund letter, agreed to by both parties, is ineffective because not filed. Texaco, on the other hand, is forced to argue that the void Kansas order, although not agreed to by Cities, is effective because filed while the refund letter, although filed at the same time, is ineffective because not agreed to by Texaco.

The simple, unalterable fact is that any claim to an unconditional 11c rate must be based solely on the Kansas 11c minimum price order and nothing can change the fact that that order is a nullity. Moreover, Texaco's rate schedules clearly reflect its refund obligation to Cities. The rate to be determined from the rate schedule is unequivocally tied in with the validity or invalidity of the Kansas

order. Just as clearly, Pan American's rate schedule calls for an applicable rate which is determinable only by reference to the validity or invalidity of the Kansas order. Pan American cannot seriously claim that it escaped any obligation to make refund by the simple expedient of omitting to file the refund letters. Its contract with Cities is specifically subject to all "lawful orders of all regulatory bodies . . . having jurisdiction." (R. 303). Either Cities' letter to Pan American and Pan American's written agreement to make refund are simply "executory of the contract between the parties" and the failure to file them is immaterial, or, Pan American has confessed a violation of the Commission's regulations for which it seeks this Court's approval.[14]

Nor can Petitioners claim that the submission of a billing statement reflecting a billing price of 11c per Mcf extinguished their obligations to make refund. Under the regulations, the billing statement is not a part of the rate schedule but merely an attachment thereto, 18 C.F.R. §§ 154.92(a), 154.93. The Commission's form letter of acceptance to Pan American does not purport to accept the billing statement for filing and it is therefore inappropriate to urge that the attachment of such a statement could in any way modify the parties' relationships. And, although Texaco's billing statements were initially designated as supplements to its rate schedule (R. 140-143), the Com-

[14] In asserting that its rate filings terminated any refund obligations, Pan American finds support in two cases which concerned conversion tariffs filed by pipeline companies pursuant to the Federal Power Commission's Order No 144. *Mobile Gas Service Corp. v. Federal Power Commission*, 215 F. 2d 883 (3d Cir. 1954), *affirmed sub nom United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); and *Tyler Gas Service Co. v. Federal Power Commission*, 101 U.S. App. D.C. 484, 247 F. 2d 590, *cert denied*, 355 U.S. 895 (1957). These cases do not support the petitioner's contention. In both cases the Courts of Appeals correctly interpreted the conversion tariffs as restatements of the contract price and not as unilateral changes thereof. As restated, the tariffs became part of an "*unchanged* contract" 215 F. 2d at 891 note 16; 247 F. 2d at 593. The unique problems which arose out of the conversion of pipeline rate forms from contract rates to tariff rates simply are not in point as respects the effect to be given to the filings in the instant case.

mission has expressly repudiated any contention that such designation authorized an 11c rate. (R. 149). The billing statements do accurately reflect the money that was actually changing hands on June 7, 1954. Although this Court recently declined to pass on whether that fact alone establishes the effective rate, *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 269 note 7 (1960), the Courts of Appeals for both the Third and the Tenth Circuits have held that the legally effective rate is the one which has accrued by force of the contract and not necessarily the rate being billed and charged on that date. *Kerr-McGee Oil Industries, Inc. v. Federal Power Commission*, 260 F. 2d 602 (10th Cir. 1958); *Phillips Petroleum Co. v. Federal Power Commission*, 258 F. 2d 906 (10th Cir. 1958); *Natural Gas Pipe Line Company of America v. Federal Power Commission*, 253 F. 2d 3 (3d Cir. 1958), *cert. denied*, 357 U.S. 927 (1958).

Thus there has been neither proceeding nor order by the Commission which changed the conditional 11c rate to an unconditional 11c rate. The doctrine of exhaustion is beside the point simply because Cities' contractual and legal relationship to petitioners has never been modified or abrogated by an order issued by the Commission in a proceeding to which Cities was a party.

When reduced to its essentials the case at bar is extremely simple. It is nothing more than the judicial enforcement of refund contracts, the conditions of which have been satisfied. Petitioners' attempt to complicate the matter by vigorously asserting that the mere presence of the void Kansas order in the files of the Federal Power Commission has serious legal consequences. But this is not so; the order is still a nullity. It cannot change the contractual or quasi-contractual relationships between Cities and the petitioners on the theory that it remains valid as an order; nor on the theory that it has been agreed to; nor on the theory that it has been sanctioned by an appealable order of the Federal Power Commission. In the light of *Cities*

Service Gas Co. v. State Corporation Commission of Kansas, 355 U.S. 391 (1958), the Delaware courts properly refused to attribute any legal effect to the Kansas order merely because it remains physically present in the files of the Federal Power Commission. Cf. *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 226 F. 2d 60, 68 (6th Cir. 1955), *cert. denied*, 350 U.S. 987 (1956). This action by the Delaware courts does not amount to collateral reversal of an FPC order nor does it in any way circumvent or enervate Section 19.

4. The Commission recognizes that the question of the effect to be given to the void Kansas order is a question for the courts.

Action taken by the Federal Power Commission subsequent to January 20, 1958, gives the quietus to any remaining supposition that the Commission established an 11c rate on the basis of the Kansas order without respect to its validity or invalidity.

On April 28, 1958, the Commission issued a Notice of Proposed Rulemaking in Docket No. R-168, 23 Fed. Reg. 2973 *et seq.* Referring to decisions of this Court invalidating the Kansas and Oklahoma minimum price orders, the Commission expressed its conclusion that rate filings predicated on such orders "may have no legal basis" 23 Fed. Reg. 2973. The Commission further stated that among the questions which it was considering were whether such filings were invalid when filed; became invalid on the day of the decision of this Court, or on the day of the issuance of this Court's mandate, or on the happening of some other event; or whether such filings were still effective because of failure to protest the filing, or agreement to pay the filed rate, or by estoppel, or for any other reason. 23 Fed. Reg. 2974. Although the proceedings in Docket No. R-168 are still pending, the Commission has refused to make a determination of the rate effective on June 7, 1954, where the controversy as to said rate arises out of the Kansas minimum price order and the dispute is being litigated by the

parties in state and federal courts. *Socony Mobil Oil Company, Inc., (formerly Magnolia Petroleum Company)*, Docket No. G-16717, Order Denying Petition for Determination of Effective Rate, issued November 22, 1960; *Pan American Petroleum Corporation (formerly Stanolind Oil and Gas Company)*, Docket No. G-4904, Order Issuing Certificate of Public Convenience and Necessity, and Granting in Part and Denying in Part Appeal and Motions, issued December 1, 1960. In the latter case the Commission stated that price disputes involving the Kansas order are matters that "may reasonably be left for disposition by the courts." Thus the Commission's announced position on the effect to be given the Kansas order is directly contrary to that asserted by petitioners.

E. Petitioners Misinterpret the Decision in *Cities Service Gas Co. v. Federal Power Commission.*

Petitioners interrelated theories of exhaustion and collateral attack rest in large part on their misinterpretation of *Cities Service Gas Co. v. Federal Power Commission*, 255 F.2d 860 (10th Cir. 1958), *cert. denied*, 358 U.S. 837 (1958), hereinafter called the *Magnolia* case. In that case Magnolia Petroleum Company had tendered for filing its gas purchase contract with Cities, which provided for a price of 6c per Mcf, and a copy of the invalid Kansas 11c order. On November 30, 1955, Cities had brought suit against Magnolia in the United States District Court for the District of Kansas, seeking a determination of its contract rights. Jurisdiction was founded on diversity of citizenship. Cities had deposited an amount of money representing payment for gas delivered from July 23, 1955, computed at 11c per Mcf. The court impounded the difference between 6c and 11c awaiting the outcome of Cities' suit attacking the validity of the Kansas order. This was the fact situation on March 21, 1957, when the Commission accepted Magnolia's tendered rate schedule "subject, however to the express condition that such acceptance is without prejudice to any claims or contentions which have been made by or for

Magnolia Petroleum Company or by or for Cities Service Gas Company in pending litigation concerning this particular sale of gas." 255 F.2d at 861-2. Both Cities and Magnolia petitioned for rehearing and clarification and the Commission, on May 17, 1957, issued a second order striking the condition above quoted. Cities took an appeal to the Tenth Circuit urging that the Commission erred in accepting the minimum price order and praying that the reviewing court adjudicate the contract rate and the legally effective rate on June 7, 1954, to be 6c per Mcf. The court refused to adjudicate the contract rate to be 6c but did set aside the Commission's order accepting Magnolia's filed rate and directed the Commission to strike the Kansas order from its files. In the light of the intervening decision of this Court in *Cities Service Gas. Co. v. State Corporation Commission of Kansas*, 355 U.S. 391 (1958), the court's substantive holding was plainly correct, viz:

> "When the United States Supreme Court struck down the Kansas order, there was no longer a valid order which could modify the contract rate, and the contract rate was the rate effective on June 7, 1954." 225 F. 2d at 865.

Petitioners' argument, that, unless in every case stricken from the Commission's files by judicial review under Section 19, the Kansas order continues to live, is just as clearly incorrect. And it is indeed a strange argument to urge under the aegis of administrative convenience and uniformity.

The court did hold that the Commission's order accepting Magnolia's rate schedule was reviewable and that Cities was aggrieved "because the Commission's acceptance of the rate schedule was pro forma the acceptance of the rate then being paid." 255 F.2d at 863. The court did *not* hold that Cities' right to recover refunds from Magnolia in separate litigation was completely dependent upon purging the Commission's files of the void Kansas order. The court in fact recognized Cities' right to recover overpayments. Its concern that Commission acceptance of the void

Kansas order not be allowed to stand in the way of refund was plainly expressed:

> "... The power of a district court to grant reparation of amounts paid pursuant to an invited order accepted as a current rate by the Commission is presently being questioned by a petition for certiorari of the case of Natural Gas Pipeline Co. of America v. Harrington, 5 Cir., 246 F.2d 915. Regardless of petitioner's right to pursue its remedies for the return of money paid prior to March 21, 1957, its right to redeem excess payments made subsequent to the Commission's action are further imperiled in a separate action by the existence of the outstanding Commission order." 255 F.2d at 863-864.

The decision of this court on January 20, 1958, striking down the Kansas order made the merits of the *Magnolia* case unmistakably clear. That fact, we submit, together with the court's obvious desire not to prejudice Cities' then pending case against Magnolia in the District Court, assisted the Court of Appeals to its assertion of jurisdiction.

It cannot be said with certainty that the Court of Appeals would have granted review had this Court not invalidated the Kansas price order some four months earlier. Especially is this true in view of the admonition that the Commission was not to be faulted for accepting the order when first tendered. The court said:

> "Petitioner argues here that the Kansas Corporation Commission order, in view of earlier decisions of the U. S. Supreme Court was so patently invalid that the Federal Power Commission erred in giving any cognizance to the order and should have rejected it when filed by Magnolia. We reject that argument. On the pertinent date, June 7, 1954, the authority of the Kansas Commission had been upheld by the Kansas Supreme Court, the highest judicial body that had then considered the precise question in-

volved. It was not the function of the Federal Power Commission to pass upon the question of whether or not the Kansas Supreme Court was in error. Good administrative policy dictates otherwise. The inherent difficulties that may arise from a later change in judicial interpretation are not attributable to administrative fault. Our books of law carry many cases requiring reversal of a lower court by reason of a change occurring between trial and appeal." 255 F.2d at 862 note 1.

It will be anomalous if the recognition so given by the Court of Appeals to this Court's voidance of the Kansas order can now be used to breathe life into the invalid 11c minimum price so long as copies thereof remain on file with the Federal Power Commission. Petitioners urge *Magnolia* upon this Court for the proposition that Commission acceptance of a copy of the Kansas order fixes an unconditional rate of 11c unless the order be stricken on judicial review. We do not so read *Magnolia*, but if it must be thus interpreted, then this Court should decline to follow that precedent.

Petitioners seem to assert that Cities could preserve its refund rights only by physically removing the Kansas order from the Federal Power Commission files each and every time it there appeared. There is a certain absurdity in contending that administrative uniformity requires a multiplicity of appeals under Section 19, all contesting the validity of the Kansas 11c order while, at the very same time, the identical question was pending in this Court. Moreover, the implication that petitioners' filings constitute a unilateral abrogation of Cities' contract rights, successful because unprotested, carries with it an inference that the Commission has been a partner to circumventions of *Mobile*. This inference is effectively rebutted by the Commission's order entered May 25, 1956, approving settlement of Cities' rate case then pending in Docket G-2410. By the terms of that order, Cities is required to refund to its jurisdictional customers, in accordance with the formula set

forth in the order, the major portion of the refund money recovered by Cities on account of the invalidity of the Kansas 11c order. *Re Cities Service Gas Co.*, 15 F.P.C. 1448, 1453-58. Obviously then, the Commission had not accepted the Kansas order as setting an 11c per Mcf rate irrespective of the validity of said order. All that the Commission did was accept the Kansas order as a compulsive modification of Cities' contracts if, but only if, said order was valid. The order having been declared a nullity there is nothing novel in allowing a court, state or federal, to treat is as just that—a nullity. It would be novel, however, to breathe life back into the void order as petitioners here urge. Such a result would be a direct contradiction to this Court's decision in *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 355 U.S. 391 (1958).

The Delaware courts have neither collaterally revised an order of the Commission nor have they invaded the appellate jurisdiction vested in the Courts of Appeals. At the most, the Delaware courts have properly construed a contract filed as a rate schedule as is permitted under the doctrine of *Great Northern Ry. Co. v. Merchants' Elevator Co.*, 259 U.S. 285 (1922).

CONCLUSION

For these reasons, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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